

# Merrill, Hannah

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**From:** pearl hewett [REDACTED]  
**Sent:** Saturday, April 28, 2012 9:14 AM  
**To:** zSMP; Miller, Sheila Roark; Gray, Steve; earnest spees; Lois Perry  
**Cc:** harry bell; Jay Petersen  
**Subject:** Fw: Pacific Legal Foundation files an Action by the Olympic Stewardship Foundation Jeffco  
**Attachments:** Motion to File Amicus Memorandum of CAPR.pdf; Amicus Memorandum of CAPR.pdf

## LAWSUIT AGAINST WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

I submit this as my SMP comment  
Pearl Rains Hewett Trustee  
George C. Rains Estate  
Member SMP Advisory Committee

**taken out of context open attachments for full text**

No. 87053-5

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON  
OLYMPIC STEWARDSHIP FOUNDATION,**  
Petitioner,

v.

**WESTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD,**  
Agency Respondent.

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----- Original Message -----

**From:** [earnest spees](#)  
**To:** [Karl Spees](#)  
**Sent:** Friday, April 27, 2012 7:45 PM  
**Subject:** Pacific Legal Foundation files an Action by the Olympic Stewardship Foundation Jeffco

This is not for everyone but it gives you an idea what our allies are doing in Jefferson County.

Karl Spees - Pres. CAPR 13

--- On Fri, 4/27/12, Jeff Wright

All,

From time to time, CAPR Legal Fund will prepare amicus briefs in support of court challenges that are in the interest of property rights. Many are in coordination with Pacific Legal Foundation and our sister organizations. The most recent is in support of Olympic Stewardship Foundation's petition for review to the Washington Supreme Court. In this instance, OSF is being represented by PLF. This brief, like others, was prepared by Paul Hirsch who is an attorney and also an environmental scientist. He spoke at this year's Workshops prior to the Banquet.

As part of its critical areas regulations, Jefferson Co. adopted river "channel migration zones" rules which place harsh restrictions on areas where river channels *might* move to over time. In this case, the CMZ's affect wide swaths of land. This is typical of the shotgun approach to environmental policies that is all too common and the effect on property rights is obvious.

Attached you will find the motion to file the brief and the brief. They are quick reads and even if you don't have interest in this topic, reading them will help you become familiar with this part of the legal process.

Jeff Wright

President

Citizens' Alliance for Property Rights Legal Fund

[REDACTED]

[REDACTED]

-----Inline Attachment Follows-----

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Capr-gov mailing list

[REDACTED]

<http://mailman.celestial.com/mailman/listinfo/capr-gov>

No. 87053-5

IN THE SUPREME COURT  
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**MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM  
OF CITIZENS' ALLIANCE FOR PROPERTY RIGHTS  
IN SUPPORT OF PETITION FOR REVIEW**

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Paul J. Hirsch  
WSBA No. 33955  
HIRSCH LAW OFFICE  
P.O. Box 771  
Manchester, Washington 98353  
Tel: (360) 649-0042  
pjh@hirschlawoffice.com  
*Attorney for Citizens' Alliance  
for Property Right*

## RELIEF REQUESTED

Pursuant to Rules of Appellate Procedure 13.4(h) and 10.6, Citizens' Alliance for Property Rights ("CAPR") respectfully moves this Court for an order allowing it to file the accompanying Amicus Curiae Memorandum of Citizens' Alliance for Property Rights in Support of Petition for Review.

## IDENTITY AND INTEREST OF AMICUS

CAPR is a non-partisan, not-for-profit corporation where individual citizens and existing organizations work together to protect property rights. CAPR, with individual members and local chapters throughout Washington and California, supports equitable and scientifically sound land use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all.

CAPR frequently sponsors workshops for citizens on the scientific basis for critical area designations. Experts are invited to inform attending citizens of the rationale for such designations.

CAPR has significant experience in litigation involving the protection of property rights, including litigation involving overreach by local jurisdictions in the application of critical area ordinances to private property without there being shown sufficient justification for

impingement on the rights of ownership. *See, e.g., Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), *rev. denied* 165 Wn.2d 1030 (2009).

CAPR, its members, and supporters are very active in Jefferson County, having submitted extensive comments on the County's recent Locally Approved Shoreline Master Program. That Program incorporates the shoreline portion of the County's critical area ordinance, of which the regulation here under challenge by petitioner Olympic Stewardship Foundation is a part. Therefore, the case *sub judice* is of great importance to CAPR and its members as it is anticipated that the Department of Ecology will soon approve Jefferson County's Shoreline Master Program, disregarding CAPR's well-founded criticisms.

#### AMICUS APPLICANT'S FAMILIARITY WITH THE CASE

Counsel for CAPR has reviewed and is familiar with the Court of Appeals decision for which review is sought (Appendix A of the Petition for Review), the Growth Management Hearings Board's Final Decision and Order (Appendix B of the Petition for Review), the Growth Management Hearings Board's Order on Compliance (Appendix C of the Petition for Review), the Petition for Review, Jefferson County's Answer to Petition for Review, and the briefs below.

## ISSUES ADDRESSED BY AMICUS

CAPR addresses two issues in its memorandum. One, the manifest disconnect between the nominal purpose the County gives for the imposition of a 100 percent vegetation protection zone in high-risk channel migration zones (“CMZs”) – protection of public and private property from river channel avulsion and migration – and the real purpose as revealed in the County’s own words and arguments, i.e., protection of the ecological functions and habitat values of river valleys even beyond that afforded by the here unchallenged stream buffers.

Secondly, CAPR discusses what it means to “include the best available science” when developing land use policies and regulations. RCW 36.70A.172(1).

## NEED FOR FURTHER ARGUMENT

With respect to the first issue addressed by CAPR, the disconnect between the rationale given by Jefferson County for CMZs and the real purpose as revealed in the County’s own words, the petitioner Olympic Stewardship Foundation, doubtless because of being bound by page limits and the many other important issues it needed to cover in this case, was not able to fully explore – and quote – the many instances in which the County makes clear that its motivation in designating CMZs is not to protect people from the geological hazard of migrating river channels, but

rather to protect migrating river channels from encroachment by people. CAPR submits that its briefing will assist the Court in taking a wider view of the County's adoption of its CMZs and the attendant abuse of the discretion afforded the County under the Growth Management Act.

Secondly, CAPR, through a familiarity with scientific method and sources, believes it brings a unique perspective to the use of science in policy making. In its memorandum it applies this perspective to compare the policy maker's use of scientific materials with a court's use of case law. CAPR believes its comparison of these methods, which it argues are more similar than not, will assist the Court in more fully appreciating the deficiencies of Jefferson County's inclusion of best available science in establishing its CMZs.

#### CONCLUSION

CAPR requests that this Court grant its motion to file an amicus curiae memorandum in support of the Petition for Review of the Olympic Stewardship Foundation.

Respectfully submitted this 23<sup>rd</sup> day of April, 2012.

s/ Paul J. Hirsch

Paul J. Hirsch, WSBA No. 33955  
*Attorney for Citizens' Alliance for  
Property Rights*

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 23, 2012, I served by USPS mail, postage prepaid, the foregoing document on counsel of record for Jefferson County and Western Washington Growth Management Hearings Board. Service on counsel for Olympic Stewardship Foundation, by prior agreement, was by email attachment in the manner permitted by Supreme Court General Order No. 25700-B-334.

Mark R. Johnsen  
Karr Tuttle Campbell  
1201 Third Ave., Suite 2900  
Seattle WA 98101  
mjohansen@karrtuttle.com  
*Attorney for Jefferson County*

Marc Worthy  
Assistant Attorney General  
Licensing and Administrative Law  
Division  
1125 Washington St.  
PO Box 40110  
Olympia WA 98504-0110  
MarcW@atg.wa.gov  
*Attorney for Western Washington  
Growth Management Hearings Board*

Brian T. Hodges  
Daniel A. Himebaugh  
Pacific Legal Foundation  
10940 NE 33<sup>rd</sup> Place, Suite 210  
bth@pacificlegal.com  
dah@pacificlegal.com  
*Attorneys for Olympic  
Stewardship Foundation*

DATED April 23, 2012, at Manchester, Washington.

s/ Paul. Hirsch

Paul J. Hirsch  
Attorney, WSBA 33955

No. 87053-5

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OLYMPIC STEWARDSHIP FOUNDATION,

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**AMICUS CURIAE MEMORANDUM OF  
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS  
IN SUPPORT OF PETITION FOR REVIEW**

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Paul J. Hirsch,  
WSBA No. 33955  
HIRSCH LAW OFFICE  
P.O. Box 771  
Manchester, Washington 98353  
(360) 649-0042  
pjh@hirschlawoffice.com  
*Attorney for Citizens' Alliance  
for Property Rights*

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## INTRODUCTION

Citizens' Alliance for Property Rights ("CAPR") addresses two issues that argue in favor of the Court granting the Petition for Review of the Olympic Stewardship Foundation ("OSF"). One, while Jefferson County presents its Channel Migration Zones ("CMZs") as critical areas because they are putatively zones of geological hazard, the County's own statements make clear that these critical areas are really intended to protect the ecological functions and the fish and wildlife habitat values of the river valleys themselves. Essentially, the County has employed a bait and switch scheme which needs to be called out for what it is and stopped dead if the adoption of critical area ordinances under the Growth Management Act is to retain its scientific validity and popular acceptance.

Secondly, the Court should take this opportunity to clearly explain that to "include the best available science in developing policies and development regulations" (RCW 36.70A.172(1)) means much more than listing some scientific papers in a bibliography but then failing to consider them in a reasoned process to actually develop the policies and regulations. Here, Jefferson County utterly failed to employ such a reasoned process.

## ARGUMENT IN FAVOR OF REVIEW

### 1. JEFFERSON COUNTY'S CHANNEL MIGRATION ZONE CRITICAL AREAS ARE DESIGNED TO PROTECT THE CHANNEL MIGRATION ZONES, NOT THE PRIVATE PROPERTY WITHIN THEM

In its Final Decision and Order (“FDO”)<sup>1</sup>, the Western Washington Growth Management Hearings Board explains the difference between the two types of critical areas recognized by RCW 36.70A.030(5).

The Board views the GMA as effectively establishing two categories of critical areas – those areas whose functions and values are protected for the beneficial services they provide (i.e. Wetlands, FWHCA [Fish and Wildlife Habitat Critical Areas], Aquifer Recharge Areas) and those areas for which protection is needed due to the threat these areas pose to persons and property (i.e. Frequently Flooded Areas, GHAs [Geological Hazard Areas]).

Although CMZs can incorporate all five of these types of critical areas, Jefferson County elected to include CMZs within the category of GHAs primarily due to the erosive character of a CMZ and the need to protect structures from future damage. [*Id.* at 27, footnote omitted.]

As the Board notes, the CMZs might sweep up all types of critical areas but their *declared* purpose is supposedly to protect life and property. It is on this ground that the Board, the Superior Court, and the Court of Appeals upheld them. Of course, since we are here discussing the big rivers of Jefferson County, stream buffers are already applied within the

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<sup>1</sup> Citizens Protecting Critical Areas and Olympic Stewardship Foundation et al. v. Jefferson County, WWGMHB No. 08-2-0029C (Final Decision and Order, November 19, 2008), Petitioner’s Appendix (App.) B.

CMZs, protecting the fish and wildlife habitat critical areas. Wetlands that might be within a CMZ would likewise be separately protected and buffered. The same is true of frequently flooded areas and any aquifer recharge areas that might be present; these would be separately protected and buffered.

Nowhere in the record is there any detailed analysis of economic loss, not to mention loss of life, caused by channel avulsion or migration in Jefferson County. It is clear from the argument of the County itself that it is the *habitat value* of CMZs that is being protected by the prohibition on development in these broad swaths of land.

The County's arguments in defense of these takings of private property are replete with statements going to the ecological value of these areas, areas that extend well beyond the already sizable stream-habitat buffers. At p. 25 of the FDO, the Board quotes one such statement in particular from the County's Response Brief.

Jefferson County argues that the GMA authorizes it to designate critical areas based on BAS and CMZs are "important natural features of healthy river systems" and "are vital to the *continuing ecological integrity of riparian systems.*" [Emphasis added.]

Clearly, it is the health of the river systems and their ecological integrity that are being protect here, not the safety of people or their property. One might think that the above quote is just one sentence from

one brief and amicus CAPR is reading too much into it. But rather than abandoning this line of argument, or at least, soft-pedaling it, Jefferson County's Answer to OSF's Petition for Review ("Answer") before this Court makes the point even more explicitly.

In its Counter-Statement of the Case at p. 3 of its Answer, the County while acknowledging "dangers to private and public property," emphasizes that "[m]oreover, the CMZ provides aquatic and riparian habitat for fish and other wildlife by ensuring that the fluvial process is accommodated."

In discussing the discretion afforded local jurisdictions in tailoring critical area protection to local conditions, the County's Answer, at p. 7, states:

The GMA stresses that when adopting regulations to protect critical areas "special consideration" is to be given to protection and conservation measures which preserve and enhance habitat for salmonids. CMZs certainly fall within this area of special consideration. (AR 1 at 715)."  
[Internal citations omitted.]

Amicus agrees that the CMZs are certainly more adapted to possibly protecting salmon than to their declared purpose of protecting people. But that is not how these CMZs have been sold to and approved by the Board and the courts. *See, e.g.*, AR 2 at 17 (legislative finding 40); App. B (FDO) at 29 ("the functions and values sought to be protected by GHAs [i.e.,

CMZs] are the protection of life and property”) and 47 at Finding 23 (“The functions and values sought to be protected by GHAs [i.e., CMZs] are the protection of life and property ...”).

Further, on p. 12 of its Answer, Jefferson County summarizes its purposes for protecting CMZs.

*Protection of CMZs is increasingly recognized as vital to ensuring (a) protection of river functions; (b) protection and enhancement of salmonids habitat; and (c) protection against catastrophic flooding and the property damage and loss of life which can follow. (AR 1 at 711-712).”*  
[Emphasis added.]

These quotes give the game away. It is not people and their property that need protection from channel migration, it is the potentially migrating channel that needs protection from people; apparently, more protection that the County thinks it can credibly accomplish with the stream-habitat buffers that OSF does not challenge in this appeal.

## 2. THE MERE GATHERING OF SCIENTIFIC REFERENCES AND THE BALD ASSERTION THAT THESE WERE CONSIDERED DOES NOT SATISFY THE INCLUSION OF BEST AVAILABLE SCIENCE

A court does not simply state its decision in a sentence or two, list prior cases it asserts support its announced decision, and promulgate the decision as law. Rather, courts carefully outline the relevant facts and law in opinions, diligently weighing the application of the law to the relevant facts, parsing prior cases sentence by sentence – often word by word –

explaining in detail why and how the cited cases support their conclusion and why cases that appear not to support the conclusion can be distinguished or were wrongly decided and must be overruled. Even in per curium and unpublished decisions this process is normally written out at length for all to see and understand, thus making a court's thinking transparent to those interested persons. This is what due process demands, and our appellate courts routinely discharge this arduous duty since the rights of the citizens those freedom, money and property are at stake demand nothing less.

The review of scientific studies by a legislative body formulating policy that affects the rights of the citizens under its authority should not be any less rigorous. The scientific studies that may be relevant are really not so different for the policy maker than the case law is for a court. Both are objects to be analyzed and parsed with care, their possible relevance sought, their conflicts explicated and resolved, and based on this process judgments made.

Here, the process employed by the Jefferson County Board of County Commissioners lacks such explicit and open consideration of even that best available science the County claims it relied upon. *See* Pet. Rev. at 5-7. Rather, in this instance the County selected one possible solution to channel migration out of a range of options and did so without publicly

weighing it against other, more efficient options such as rip-rap, soft armoring by large woody debris, etc. Pet. Rev. at 6, n.4. *See, also*, AR 1 at 427-28 (discussing rip-rap, log jams, and root wads at meander bends), AR 1 at 428-29 (bank armoring at scour points), AR 1 at 429 (hard armoring in emergencies), AR 1 at 273-75, 278, 351, and 371 (effectiveness of existing protective measures).

Jefferson County departed from what its BAS was telling it and therefore, under the prior precedents of this Court, must, *at a minimum*, employ a reasoned process to justify this departure. But the Court of Appeals did not hold the County to these precedents.

This case presents us with a situation in which the County identified numerous scientific studies that it relied on in adopting the vegetation regulation *but did not explicitly analyze on the record how these studies supported its decision* to prohibit vegetation removal in high-risk CMZs adjacent to five county rivers. [App. A, 17-18; emphasis added.]

Scientific papers, when used for policy formulation, are not self-executing. Their findings must be parsed, measured for consistency, weighed for pertinence to the problem at hand, and applied to the situation the policy maker is trying to address. This demands a reasoned process that, if it is to comply with the core principles of due process – “openness and fair play” (*Swinomish Indian Tribal Comty. v. W. Wash. Growth Mgmt. Hr’gs Bd.*, 161 Wn.2d 415, 442, 166 P.3d 1198 (2007) (Johnson, J.,

concurring in part and dissenting in part)) – must be made explicit for the citizens whose property is being regulated.

The key precedents, *Swinomish* and *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), both grew out of cases with somewhat unusual facts. In *Swinomish*, the critical areas at issue already had significantly disturbed buffers and the case turned on the distinction between protection and enhancement. In *Concerned Friends of Ferry County*, Ferry County adopted a position on threatened and endangered species that was widely thought to be out of the mainstream. This Court's need to sculpt opinions addressing those facts may be what led the Board to its crabbed reading of those cases. "[B]oth *Swinomish* and *Ferry County* set forth the principle that if a jurisdiction seeks to deviate from BAS it must provide a reasoned justification for such a deviation." App. B at 19. But these cases can and should be read more broadly to stand for the principle that the inclusion of BAS *always* requires a reasoned process, apparent and honest.

Amicus CAPR certainly reads *Concerned Friends of Ferry County* and *Swinomish* that way. This Court's prior thinking on the meaning of BAS is most clearly seen in the opinions of the growth boards and Court of Appeals that it cites with approval in *Concerned Friends of Ferry County*, 155 Wn.2d at 834-35; *Clark County Natural Res. Council v.*

*Clark County*, No. 96–2–0017, 1996 WL 716195, at \*5 (W. Wash. Growth Mgmt. Hr'gs Bd. Dec. 6, 1996) (whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process); *Friends of Skagit County v. Skagit County*, No. 96–2–0025, 1998 WL 637160, at \*12 (W. Wash. Growth Mgmt. Hr'gs Bd. Sept. 16, 1998) (the local government must provide a reasoned analysis of the range of alternatives presented by the scientific evidence in the record); *Easy v. Spokane County*, No. 96–1–0016, 1997 WL 191457, at \*6 (E. Wash. Growth Mgmt. Hr'gs Bd. Apr. 10, 1997) (local governments must analyze the scientific evidence and other factors in a reasoned process); and *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999) (“evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.”)

These all speak to a reasoned process in the application of BAS, and not just when a local jurisdiction is deviating from the BAS it has compiled. Jefferson County neither engaged in a such a process when it deviated from its BAS nor, indeed, at all.

Finally, besides not weighing the science itself in a reasoned process, the County did not weigh its putative need to protect private property from

a geological hazard by the use of an extreme measure against the explicit command of the Washington legislature to consider all of the planning goals set forth in RCW 36.70A.020, including goal 6: “Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.”

Planning goal 6 makes it perfectly clear: If, as amicus CAPR argues above, Jefferson County’s CMZs are actually intended to protect the ecological functions and habitat values of river valleys and if this protection were to be deemed an essential public good, then the County must buy the CMZs from the owners; if, as the County argues, CMZs are necessary to protect property, the County’s own BAS shows more effective and less intrusive ways of doing so, ways that also better protect property rights.

#### CONCLUSION

Amicus CAPR respectfully asks that the Petition for Review of the Olympic Stewardship Foundation be granted.

Respectfully submitted this 23<sup>rd</sup> day of April, 2012.

s/ Paul J. Hirsch

Paul J. Hirsch, WSBA No. 33955  
*Attorney for Citizens’ Alliance for  
Property Rights*

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 23, 2012, I served by USPS mail, postage prepaid, the foregoing document on counsel of record for Jefferson County and Western Washington Growth Management Hearings Board. Service on counsel for Olympic Stewardship Foundation, by prior agreement, was by email attachment in the manner permitted by Supreme Court General Order No. 25700-B-334.

Mark R. Johnsen  
Karr Tuttle Campbell  
1201 Third Ave., Suite 2900  
Seattle WA 98101  
mjohansen@karrtuttle.com  
*Attorney for Jefferson County*

Marc Worthy  
Assistant Attorney General  
Licensing and Administrative Law  
Division  
1125 Washington St.  
PO Box 40110  
Olympia WA 98504-0110  
MarcW@atg.wa.gov  
*Attorney for Western Washington  
Growth Management Hearings Board*

Brian T. Hodges  
Daniel A. Himebaugh  
Pacific Legal Foundation  
10940 NE 33<sup>rd</sup> Place, Suite 210  
bth@pacificlegal.com  
dah@pacificlegal.com  
*Attorneys for Olympic  
Stewardship Foundation*

DATED April 23, 2012, at Manchester, Washington.

s/ Paul. Hirsch

Paul J. Hirsch  
Attorney, WSBA 33955